

# **Attachment A**

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5 SPECIAL MASTER

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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
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11  
12 MARC SILVER, *et al.*,  
13 Plaintiffs,  
14 and  
15 BA SPORTS NUTRITION, LLC,  
16 Defendant.  
17 v.  
18  
19

CASE NO. 20-cv-00633-SI

**SPECIAL MASTER’S ORDER NO. 2:  
PLAINTIFFS’ MOTION TO COMPEL  
DEFENDANT TO RESPOND TO FIRST  
SET OF INTERROGATORIES (HRG.  
7/13/21)**

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21  
22 On June 10, 2021 Plaintiffs filed a Motion to Compel Responses to their First Set of  
23 Interrogatories (Nos. 1-12) Defendant BA Sports Nutrition filed its Opposition on July 1.  
24 Defendant filed its Reply on July 8. Having considered all arguments and evidence submitted,  
25 for the following reasons the Special Master GRANTS the motion.

26 Background Facts

27 The First Amended Complaint [Dkt. 43] alleges that Plaintiffs believed the BodyArmor  
28 drinks contained fruits in “amounts sufficient to qualify such fruits as characterizing

1 ingredients...” [FAC, ¶85] “Instead of fruits, ... Body Armor contains unnamed ingredients that  
2 function as inauthentic flavors.” [FAC, §89] Plaintiffs allege that BodyArmor has violated FDA  
3 labeling requirements and California law by failing to include the word “flavored” on its front  
4 label to show that the drink does not contain fruit in an amount sufficient to qualify as a  
5 characterizing ingredient. 21 C.F.R. 101.22(i)(1)(i). [FAC, ¶90, 91].

6 The Court denied BodyArmor’s motion to dismiss the FAC, finding that these and other  
7 allegations stated a viable claim under all the consumer protection statutes named. [Dkt. 55]

8 Plaintiffs served their First Set of Interrogatories on March 5, 2021. [Zinsou Decl., Exh.  
9 1]. Body Armor served its Responses and Supplemental Responses on April 5 and May 3, 2021.  
10 [Zinsou Decl, Exhs. 2 & 3]

11 Discovery from BodyArmor in this case has proceeded at a halting pace. Although  
12 Plaintiffs asked months ago for production of the labels for all products at issue, and although  
13 BodyArmor’s responses to the interrogatories repeatedly “direct[ed] Plaintiffs to product labels  
14 that have been or will be produced” — as of the hearing on this motion BodyArmor had not  
15 produced a single label. Indeed, Plaintiffs assert that BodyArmor has produced virtually no  
16 documents at all. (A pending motion to compel document responses will be heard on July  
17 20,2021.] A reading of BodyArmor’s responses to these interrogatories discloses that they consist  
18 of nothing but objections and a few conclusory general statements.

#### 19 Analysis

20 The issue on this motion is simple: does Body Armor need to disclose the ingredients in  
21 its products and the amounts of each ingredient, including the ingredients in the so-called “flavor  
22 packet”. The Special Master concludes that of course it must.

23 All twelve interrogatories ask Body Armor to identify the ingredients in its products and  
24 to explain its labeling. No. 1 asks for an identification of every fruit on a front label that is an  
25 actual ingredient. No. 2 asks for an identification of every product that does not have a fruit on its  
26 label. No. 3 asks for an identification of every ingredient that is used to imitate the taste of fruit,  
27 including every ingredient within, e.g., “Natural Orange Mango Flavor.” Nos. 4-9, deriving from  
28 the FDA labeling regulations in 21 C.F.R. 101.22, ask whether the BodyArmor labels say

1 “flavored,” or “with other natural flavors,” or “artificially flavored” — and if not, why not. Nos.  
2 10/11/12 ask whether any products make representations as to the primary recognizable flavor (by  
3 picture or words), and if not why the labels depict fruits and say, e.g., “Orange Mango Flavor” in  
4 the Ingredients list.

5 BodyArmor’s entire substantive response, with slight wording variations, was that the  
6 products “contain natural flavors as stated on each label in accordance with FDA regulations.  
7 The natural flavors contained in each product are derived from at least the fruits depicted on its  
8 labels.” [Zinsou Decl., Exh. 3] BodyArmor basically ignored the precise information demanded  
9 by each interrogatory and simply repeated this conclusory mantra. Its responses are a textbook  
10 example of an “evasive or incomplete disclosure” prohibited by FRCP 37(a)(4).

11 The pertinent FDA regulations make challenging reading, but amount to this somewhat  
12 over-simplified regimen. If a label has a picture of a strawberry, but contains an insufficient  
13 amount of strawberry to make the food taste of strawberry, the word “flavored” must be  
14 prominently on the label. If the food contains both flavor actually from strawberries and another  
15 natural flavor (e.g., apple juice), it must be labeled “with other natural flavor.” If the food does  
16 not contain any flavor derived from strawberries, it must be labeled “artificially flavored.” If the  
17 food contains any artificial flavor that resembles strawberries, it must be labeled “artificially  
18 flavored strawberry” 21 C.F.R. 101.22(1(i-iii), (2).

19 Plaintiffs allege that BodyArmor’s products violate these regulations by not containing the  
20 words “flavored” or “with other natural flavor” or “artificially flavored,” etc. In order to prove  
21 that allegation, Plaintiffs and ultimately the Court must know the flavoring ingredients and their  
22 amounts. Which labeling is required depends entirely on what is in the so-called “flavor packet”  
23 — does the flavor derive from the actual depicted fruit, does it derive in part from some other  
24 natural flavor, does it derive from any artificial flavor? Body Armor’s responses are wholly non-  
25 responsive — they say only that the products “contain natural flavors” but not the amounts or the  
26 sources of those flavors, and that the natural flavors are derived “at least” from the depicted fruit  
27 but not what else they are derived from. Body Armor maintains that it buys the “flavor packet”  
28 from a third party that will not disclose the actual ingredients. The Court cannot accept that

1 excuse because it makes it impossible to evaluate Plaintiffs' allegations. Hopefully, armed with a  
2 Court order Body Armor will be able to learn the precise ingredients and their amounts. The  
3 Court can order that the information be treated as "Attorneys' Eyes Only" and not disclosed to  
4 BodyArmor or Plaintiffs. If Body Armor cannot or will not obtain the required information,  
5 Plaintiffs will be forced to subpoena the information from the third party supplier.

6 For these reasons, the Special Master finds that Plaintiffs' interrogatories are proper and  
7 request information that is not only relevant, but essential, to proving the allegations of its First  
8 Amended Complaint. BodyArmor's briefing focuses heavily on other purported defects in  
9 Plaintiffs' case that make it unmeritorious. But arguing the merits on a discovery motion is futile.  
10 Discovery exists so that a party may obtain facts needed to prevail. The possibility that its claim  
11 may be dismissed in the future is no basis whatsoever for denying or limiting discovery.

12 Order

13 Good cause appearing, IT IS ORDERED that Defendant's motion is GRANTED.  
14 BodyArmor shall serve within 30 days full and complete supplemental responses that specifically  
15 identify, precisely as requested in each interrogatory, all ingredients in each BodyArmor product  
16 referred to in the First Amended Complaint.

17  
18 Dated: July 16, 2021

19 DocuSigned by:

*Martin Quinn*

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Martin Quinn, Special Master

**PROOF OF SERVICE BY E-Mail**

Re: Silver, Marc, et al. vs. BA Sports Nutrition, LLC  
Reference No. 1100111260

I, Sandra Chan, not a party to the within action, hereby declare that on July 16, 2021, I served the attached SPECIAL MASTER'S ORDER NO. 2: PLAINTIFFS' MOTION TO COMPEL DEFENDANT TO RESPOND TO FIRST SET OF INTERROGATORIES (HRG. 7/13/21) on the parties in the within action by electronic mail at San Francisco, CALIFORNIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at San Francisco, CALIFORNIA on July 16, 2021.



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